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IN THE

Supreme Court of the United States

October Term, 1967.

No. 945.

PHILADELPHIA TRANSPORTATION COMPANY, PHILADELPHIA MARKET STREET SUBWAY-ELEVATED RAILWAY COMPANY, MOTOR REAL ESTATE COMPANY, HILL TOP LAND COMPANY, and TRENTON-PHILADELPHIA COACH COMPANY,

and

JOSEPH N. JANNEY, E. GRIGGS ADAMS, STANLEY E. DANNECKER, W. WRIGHT and ELIZABETH B. HUMPHREYS, THOMAS A. MARSTON, H. MELVIN POWELL, CARL SCHMIEG, and CHARLES F. and JANICE F. TROUTS, *Petitioners,*

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

and

CITY OF PHILADELPHIA.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

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I.

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED.

In 1907, the City of Philadelphia entered into a comprehensive Agreement with the Philadelphia Rapid Transit Company (PRT), which agreement, as amended in 1939, provided, *inter alia,* that the City or its assignee could purchase on any July 1 all of the assets of PRT's successor, the Philadelphia Transportation Company (PTC) for a price specified in a formula contained in the Agreement. This right of purchase was duly assigned by the City to the Southeastern Pennsylvania Transportation Authority (SEPTA), which thereupon exercised said right. PTC publicly announced it would refuse to sell its assets under the Agreement, causing SEPTA and the City to seek an interpretation of the Agreement by a declaratory judgment action filed in the Common Pleas Court of Philadelphia. The trial court interpreted the Agreement as written and held that it called for PTC to transfer its assets to SEPTA, free and clear of all liabilities including an unrecorded vested pension liability, at a price equal to the sum of: (1) the funded debt; (2) the outstanding capital stock at $10.00 per share; and (3) the retained earnings, if any. The trial court also held that because PTC was frustrating the performance of the Agreement, SEPTA had until at least six months after the end of the litigation to make payment of the purchase price. The trial court's decision was affirmed by the Court of Common Pleas *en banc,* thereby making this decision final for *res judicata* purposes under Pennsylvania law until reversed. PTC appealed this deci-

sion to the Supreme Court of Pennsylvania, and thereafter, by an improperly constituted Board of Directors, attempted to declare a dividend, merge with another company, and authorized filing of another suit in the Federal District Court raising the identical issues which PTC, as appellant, had already placed before the Supreme Court of Pennsylvania. The trial court issued a preliminary injunction enjoining all three actions, pending deposition of the appeal but specifically stated that at any time PTC could seek a hearing on the preliminary injunction as to whether it should be made permanent. PTC elected to appeal the preliminary injunction to the Supreme Court of Pennsylvania, which after argument, affirmed the decisions of the trial court and the court *en banc* in both the original declaratory judgment action and the preliminary injunction proceeding. Thereafter, PTC did commence a suit in the Federal District Court and this suit is presently pending without threat of any contempt proceeding against PTC.

Therefore, the questions presented are:

1. Should this Court grant certiorari to review a state court decision which merely interprets words as written in a contract between a transit company and a municipality, providing a fixed price formula by which the City or its assignee can purchase all of the assets of the transit company?

2. Should this Court grant certiorari to review a preliminary injunction, now expired, which was issued by a lower state court to prevent defendant from starti g a federal suit until the state supreme court had acted on an appeal already taken by defendant raising the same issues sought to be presented to a federal court, where (a) the preliminary injunction

expressly provided that defendant was permitted to pursue its right of direct appeal including review by this Court, and that defendant at any time could obtain a hearing in the lower court on whether a final injunction should issue, (b) defendant has now commenced a suit in federal court following the decision on appeal by the state supreme court, and (c) even if the preliminary injunction had not been issued, any federal suit would then have been barred under principles of *res judicata,* by the final lower state court decree which was handed down four months prior to issuance of the preliminary injunction?

II.
COUNTER-STATEMENT OF THE CASE.

This is a contract case in which the state courts, interpreting the clear meaning of a contract under settled principles of state law, have refused to allow one party to the contract to avoid its contractual obligations thereunder. Thus, the fundamental issue is and has always been whether the Philadelphia Transportation Company (PTC) can avoid, solely by delay, its solemn promise to sell to the Southeastern Pennsylvania Transportation Authority (SEPTA), as assignee of the City of Philadelphia (the City), the portion of Philadelphia's transit system owned by PTC for an amount calculated according to a fixed contractual price formula to which PTC voluntarily agreed. The courts of Pennsylvania, following settled principles of state law, have uniformly held that PTC must honor its promise.[1] PTC now asks this Court to grant a writ of certiorari to declare that the contract is unconstitutional. That this is nothing more than an attempt to relitigate the basic state law questions is shown by the vague and rambling nature of the Petition, which fails to present a coherent position "with accuracy, brevity, and clearness" as required by Rule 23(4) of this Court.

The historical facts behind this litigation are helpful to an understanding of the groundless arguments which PTC now seeks to make.[2]

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1. Opinion and Decree Nisi of the trial judge (Spaeth, J.) filed July 14, 1966 (Pet. App. D), affirmed by Opinion and final Decree of the Court of Common Pleas *en banc* filed September 16, 1966 (Pet. App. E), affirmed by the Supreme Court of Pennsylvania, 426 Pa. 377, 233 A. 2d 15 (1967) (Pet. App. A).

2. These facts are recounted in some detail in the Opinion of the trial court (Pet. App., 54a-98a).

Since 1907, the Philadelphia mass transit system has been operated under a partnership arrangement between the City and PTC or (prior to 1939) its predecessor, the Philadelphia Rapid Transit Company (PRT). The core of the transit system is owned by the City. It was constructed by the City at an original cost of more than a quarter of a billion dollars (R. 1172),[3] an investment which far exceeds even the most extravagant values assigned to PTC's assets. The City has leased these facilities first to PRT and then to PTC under terms which for many years have provided a generous governmental subsidy, today amounting to more than $6,000,000 a year. The annual debt costs imposed upon the City with respect to these facilities alone are larger by that amount than the rentals charged therefor (R. 1172, 1176).

The partnership between the City and the operating transit company is embodied in a comprehensive agreement executed in 1907 and amended thereafter.[4] This agree-

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3. By 1951, the City had invested $180,480,980.86 in transit facilities (1951 Report of the City Controller, R. 570-72). The major items included in this figure are as follows:

Broad Street subway—including 200 cars	$108,497,749.62
Extensions of Market Street subway to 46th Street, and subway surface facilities to 36th & Ludlow, and 40th Street & Woodland Ave.	27,304,846.34
City Hall Concourse, Ridge Ave., 8th Street subway, Locust Street subway	26,454,224.88
Frankford Elevated Railway—construction and equipment including 100 cars	14,048,713.91
Bustleton surface line construction and equipment (no longer in operation)	573,136.45
Conversion of Bustleton surface line to trackless trolley operation	918,471.00

Since 1951, the City has invested an additional $72,000,000 in improved transit facilities, making a total investment in the transit system of $252,800,000 (R. 1172).

4. The 1907 Agreement and the 1939 amendments thereto were admitted into evidence at trial as Plaintiffs' Exhibits 1 and 6 (R. 2480-90, 2492-2504, 308-09, 323).

ment has always included as an essential element the right of the City or its assignee, upon notice, to acquire the assets of PTC or its predecessor at a fixed formula price. In 1939, when a bankrupt and worthless PRT was reorganized into the present PTC, the language of the reserved right of purchase set forth in paragraph Eleventh was amended into its present form:

> "Eleventh. The City reserves the right to purchase all the property, leaseholds and franchises of the Company and its wholly-owned subsidiaries upon any first day of July hereafter, by serving six months' notice on the Company of its intention so to do and upon paying to the Company upon the date named in said notice, an amount equal to the sum of the face amount, or call price if any, and accrued interest of all then outstanding bonds of, and all then outstanding prior lien bonds, mortgages and ground rents on the property of, Company and its wholly-owned subsidiaries, plus the par value of all then outstanding preferred stock of Company, and an amount equal to ten (10) dollars per share for all then outstanding common stock of Company, and the amount of the then undistributed corporate surplus, if any, of Company. The City's aforesaid right to purchase shall cover the entire transportation system and property, leaseholds and franchises of the Company and its wholly owned subsidiaries, as a whole, at the time the City exercises said right to purchase and said option to purchase is in lieu of all existing options which the City now has in any form, whether applicable to the whole system or parts thereof or interest therein: *Provided, however,* That the City reserves to itself whatever right to condemn it now has or shall hereafter have under any present or future legislation giving the City

> the right to condemn. This contract shall continue in force until such right is exercised, but whenever the right is exercised the City shall succeed to and become the owner of all the franchises, leaseholds (including all leaseholds from the City to the Company), rights, property and privileges theretofore vested in the Company and its wholly-owned subsidiaries and the City may either operate the same or lease the right to operate the same for such terms and upon such conditions as it may deem fit. The right of the City to purchase under this paragraph shall be assignable and may be put up at public auction to the highest bidder therefor. The Company reserves its franchise to be a corporation with the power to operate passenger transportation systems and may become a bidder for such right."

Two significant changes were made in the 1939 price formula from its former terms in the 1907 Agreement. They are:

first, the words "subject to all indebtedness now existing or hereafter lawfully created hereunder" which had previously followed the description of the assets to be acquired, were stricken out, thereby insuring that neither the City nor its assignee was obliged to assume any of PTC's debts and obligations; and

second, the purchase price was changed from an amount equal to the par value of PRT's outstanding stock to an amount equal to the funded debt of PTC, plus $10 per share of then outstanding common stock, which is the par or stated value of that stock, plus PTC's "then undistributed corporate surplus, if any" which the state courts have logically construed to mean undistributed earnings available for cash dividends.

PTC has always recognized that the contractual commitment which is embodied in the foregoing provisions is a promise enforceable against the company. The promise was fully set forth by PTC in every balance sheet issued by the company, and sent to all stockholders, for twenty years until 1965, after this litigation commenced[5] (Exhibit P-27, R. 2551-74, 362-63).

After 1939 it became increasingly apparent to the City and the public that Philadelphia's transit system was becoming progressively more inadequate, and that some new arrangements would have to be made. In more than fifty years, neither PRT nor PTC was able or willing to finance the cost of a single major expansion of the transit system. Thus the City determined that it would have to exercise its right of purchase for which it had bargained in the 1907 Agreement as amended, and because of which it provided subsidies to PTC and afforded it free services. But PTC opposed and sought to frustrate that effort every step of the way. In 1961, PTC prevented the City from obtaining a judicial declaration of the meaning of the price formula. *Philadelphia v. Philadelphia Transp. Co.*, 404 Pa. 282, 171

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5. A typical PTC report stated:

> The Agreement of July 1, 1907, as amended, between the City of Philadelphia and the Company provides, among other things, for the right of purchase by the City of the entire transportation system and property, leaseholds and franchises of the Company and its wholly-owned subsidiaries (except the corporate franchise of the Company). The City may exercise upon six months' notice its right to so purchase all the property, leaseholds and franchises on July 1 of any year by paying to the Company an amount equal to the sum of (1) the face amount or call price, if any, and accrued interest of all outstanding bonds, mortgages and ground rents of the Company and its wholly-owned subsidiaries, (2) the par value of all then outstanding preferred stock, (3) $10 a share for all then outstanding common stock, and (4) the undistributed corporate surplus, if any. (1963 Annual Report, Exhibit P-27S, R. 2572, 362-63.)

A. 2d 768 (1961). Thereafter, the City assigned the right of purchase to SEPTA.[6] The Supreme Court of Pennsylvania held that this assignment, specifically authorized by the contract, was made in accordance with Pennsylvania law (Pet. App., 7a-8a).

Following this assignment, SEPTA gave notice to PTC of SEPTA's exercise of the right of purchase, settlement to be held on July 1, 1966. PTC, however, publicly repudiated its obligation to sell under the agreement, knowing that such repudiation would, in the words of PTC's President, "make it virtually impossible [for SEPTA] to finance the acquisition of PTC by the option method" (R. 389).

SEPTA and the City were therefore obliged to commence litigation to obtain a binding declaration of the validity and meaning of the right of purchase. PTC's campaign of obstruction continued unabated. On July 27, 1965, PTC

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6. SEPTA was created in 1964 pursuant to the Metropolitan Transportation Authorities Act of 1963, P. L. 984, 66 P. S. § 2001 *et seq.* The recitals in that statute included the following:

> "[T]here exists in the urban and suburban communities in metropolitan areas, traffic congestion and serious mass transportation problems because of underdeveloped, uncoordinated obsolete mass transportation facilities resulting in inadequate or overcrowded high cost conditions on our highways and existing mass transportation facilities;" 66 P. S. § 2002(a).

Recognizing that "the foregoing conditions cannot be effectively dealt with by private enterprise under existing law", and that "the public acquisition of existing mass transportation facilities . . . will promote the public health; safety, convenience and welfare," the Legislature concluded that "it is desirable that the public transportation systems in the metropolitan areas be combined, improved, extended and supplemented by the creation of authorities," and that "such authorities [should] cooperate with and/or acquire existing transportation facilities. . . ." 66 P. S. § 2002(c), (d), (f) and (h). The Legislature further determined that it would be in the public interest for municipalities, counties, etc., to transfer to such authorities "with or without consideration . . . any interest in real or personal property or . . . any . . . thing of value . . . which may be used by authority in the . . . acquisition [of transit facilities]." 66 P. S. § 2026.

unilaterally, and without justification, expelled the five City Directors who sat on PTC's Board pursuant to paragraph Fourth of the 1907 Agreement, as amended (R. 59-60 and Exhibits P-2a-2h in Appeal No. 229 in the Pennsylvania Supreme Court, R. 251-59, 55-58); PTC refused to permit SEPTA's engineers to examine PTC's property and records until forced to do so by a mandamus action, *Southeastern Pennsylvania Transportation Auth. v. Philadelphia Transp. Co.*, 38 D. & C. 2d 653 (Phila. 1965); PTC refused to permit the City Controller to make the examination of PTC's financial records called for under paragraph Fifth of the 1907 Agreement, as amended (Exhibits P-2i and 2j in Appeal No. 229, R. 260-61, 56-58); PTC refused to accept the jurisdiction of the court below in the declaratory judgment action brought by SEPTA and the City until ordered to do so by the Pennsylvania Supreme Court, *Southeastern Pennsylvania Transp. Auth. v. Philadelphia Transp. Co.*, 419 Pa. 471, 214 A. 2d 632 (1965); PTC then negotiated a settlement agreement with SEPTA through negotiators who specifically stated that they were authorized to speak for, and commit a majority of the PTC shareholders (R. 2368-69), but who, after five months of delay, failed to meet their commitment to obtain majority shareholder approval of the settlement (R. 1024-26); a substantial majority of PTC's directors promised to approve the settlement agreement and to use their best efforts to obtain shareholder approval thereof (R. 819-21; Exhibits P-29, P-30, R. 2592-96, 370-71, 373-74, 376), yet one of those very directors, and the shareholder interests he represented, turned around and waged a successful campaign to defeat the settlement agreement by a vote of PTC's shareholders who voted 851,768 to 788,654 against the settlement (R. 835, 1017, 1026-27, 1040-48); on the eve of trial, another PTC director and several shareholders sought to interfere with and postpone this litigation

by intervention to raise a claim of "fraud, accident or mistake" (R. 85-86), which, as the Pennsylvania Supreme Court held, the intervenors "were unsuccessful in proving" (Pet. App., 7a).[7]

Despite all of these harassments, this litigation proceeded to trial on May 16, 1966. Hearings were held through June 3, 1966, resulting (as stated in the Petition for Certiorari at p. 15) in a trial transcript of over 2,400 pages and over 80 exhibits with an additional 500 pages. At the trial, PTC first asserted that it would be wholly inappropriate to present in this proceeding any evidence of the value which PTC assigned to its assets, and that such evidence would be produced at some future date to determine the price payable by SEPTA (R. 1049-50, 1078-79); but PTC then reversed itself and attempted to introduce, through a witness not then available to testify, an out of date and inappropriate trended original cost estimate which PTC counsel had first said would not and should not be offered (R. 2188-2219).[8]

The trial judge wrote an exhaustive 157-page opinion (Pet. App. 45a-190a) analyzing all of the issues raised by PTC, and concluding that the contract right of purchase was valid and enforceable by SEPTA. With respect to the contract price which SEPTA is to pay for PTC's assets, the trial judge held that the contract provided that: (1) the price shall be an amount equal to the sum required to pay off PTC's funded debt outstanding on the contractual purchase date, plus an amount equal to $10 per share for the

7. These baseless allegations have been repeated in PTC's Petition for Certiorari in the form of vague and confusing charges of a wrongful "secrecy and unfairness" by the City and SEPTA in assigning the reserved right of purchase to SEPTA (Petition for Certiorari, p. 14, fn.).

8. It is this study which provides the only basis for the wildly inflated "fair value" claims asserted throughout PTC's Petition for Certiorari.

then outstanding common stock of PTC, plus the amount of the then "retained earnings" of PTC; and (2) SEPTA shall acquire PTC's assets free and clear of all liabilities, which liabilities PTC could pay off to the extent of available cash prior to the purchase date, unless the parties agreed otherwise. Finally, the trial court ruled that SEPTA shall have a reasonable time to make the foregoing payment, such time to be not less than six months after this litigation has been finally disposed of without the possibility of further appeal (R. 171, 188-89). PTC filed 147 exceptions to the trial court's adjudication which were dismissed by the Court of Common Pleas *en banc* on September 16, 1966, thereby making the *decree nisi* final and entitled to *res judicata* effect under Pennsylvania law.

Meanwhile PTC's campaign of dilatory tactics and harassment continued. Subsequent to the declaratory judgment action, PTC and an individual taxpayer whose counsel fees were paid by PTC (Exhibit P-13 at R. 324 in Appeal No. 229, R. 310-28, 162, 392) filed a taxpayers' suit challenging the validity of the City's assignment of the contract right of purchase to SEPTA even though this very issue was fully argued and decided in the declaratory judgment action (R. 188-97). *Immediately* following the court *en banc's* dismissal of PTC's exceptions in the declaratory judgment action and the taxpayers' suit, PTC announced its intention to file appeals in the Pennsylvania Supreme Court. Yet it then refused to do so for nearly three months despite repeated efforts by SEPTA to expedite the filing of such appeals. The appeals were ultimately filed on December 12, 1966, but on December 20, 1966, PTC's board of directors acting without notice to the City Directors, and despite the pending appeals to the Pennsylvania Supreme Court for which no supersedeas had been obtained) voted *first*, to authorize prompt filing of another suit in

federal district court challenging SEPTA's right to acquire PTC's assets (Exhibit P-13 at R. 312-22 in Appeal No. 229, R. 310-28, 162, 392), *second,* to pay a dividend of $1.00 per share on January 31, 1967 (R. 42 in Appeal No. 229), and *third,* to commence negotiations with another suburban Philadelphia transportation company, which negotiations, according to PTC's press announcement, looked toward the consolidation of the companies (R. 92, 216 in Appeal No. 229).[9] Finally, during the course of this litigation PTC continuously spent corporate funds for numerous advertisements in the public press attacking the acquisition of PTC's property by SEPTA as unwise (R. 88-91 and Exhibits P-9 and P-12 in Appeal No. 229, R. 297, 309, 88-91, 125-26).

Upon learning of certain actions taken at the PTC directors' meeting on December 20, 1966 which were prejudicial to the interests of SEPTA and the City, both parties promptly sought a preliminary injunction. The hearing on the preliminary injunction was held on December 28 and 29, 1966, at which time SEPTA and the City learned for the first time that PTC intended to commence new litigation in the United States District Court in an effort to circumvent the jurisdiction of the Pennsylvania Supreme Court (R. 171-73; 391-92 in Appeal No. 229). SEPTA and the City thereupon requested that such action by the company be preliminarily enjoined pending further hearing or a decision by the Pennsylvania Supreme Court on the appeal previously filed by PTC. This preliminary injunction was granted on January 6, 1967. PTC elected not to demand a

9. The Resolutions were adopted at a meeting of which the five City Directors were not notified, and from which they were improperly excluded (R. 384, fn., in Appeal No. 229). Thus, under Pennsylvania corporate law, the Resolutions are invalid, a nullity and of no force and effect, *Redstone Township School District,* 284 Pa. 325, 330-31, 131 Atl. 226, 228 (1925); *McCay v. Luzerne & Carbon County Motor Transit Co.,* 125 Pa. Super. 217, 189 Atl. 772 (1937).

hearing on a permanent injunction, but instead appealed from the grant of the preliminary injunction to the Pennsylvania Supreme Court. This appeal and the previously pending appeal were consolidated and argued on March 14, 1967. On July 27, 1967, the Pennsylvania Supreme Court affirmed the opinion and decree of the trial court both with respect to the right of purchase and the preliminary injunction. PTC subsequently filed a Petition for Reargument in the Pennsylvania Supreme Court, which petition was denied on September 26, 1967.

On December 15, 1967, PTC commenced an action against SEPTA and the City in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 44348, seeking a declaratory judgment under the Federal Declaratory Judgment Act that the right of purchase was unconstitutional and void for the same reasons as are asserted in the Petition for Certiorari. PTC did not file that Petition with this Court until December 22, 1967, which was 87 days after the denial of PTC's Petition for Reargument by the Supreme Court of Pennsylvania.

III.

REASONS FOR DENYING THE WRIT.

A. The Pennsylvania State Courts' Declaration That PTC's Promise to Sell Its Assets to SEPTA at a Fixed Price Constituted a Valid Contract Under State Law Is Not a "Taking" of PTC's Property Without Just Compensation.

There are no genuine constitutional issues in this case. The only question, which has already been conclusively answered by the state courts under settled principles of state law, is whether PTC must honor its voluntary contractual commitment to sell its assets at a fixed price to the City of Philadelphia or its assignee. To avoid the effect of this solemn promise, PTC has attempted to create a federal question by claiming that its property is being "taken" at a confiscatory price without just compensation. This far-fetched proposition is clearly foreclosed by all the precedents in this Court and certainly does not merit review on a writ of certiorari.

All of the decisions of this Court have held that the Fifth Amendment requirement of just compensation, applicable to the states through the due process clause of the Fourteenth Amendment, is operative only where property is "taken" by the government against the owner's will, and that enforcement of a voluntary contractual obligation previously entered into between a governmental body and a private company is not such a "taking". See, *e.g.*, *Kunhardt & Co. v. United States*, 266 U. S. 537; *New York, New Haven & H. R. R. v. United States*, 251 U. S. 123, *aff'g*, 53 Ct. Cl. 222 (1918); *Albrecht v. United States*, 329 U. S. 599.

As stated by the leading text-book authority on the law of eminent domain:

> "The constitutional provision which prohibits the taking of property for public use without compensation is directed only against the enforcement of an act of the legislature which attempts to authorize the seizure or destruction of property against the will of the owner. It has no application to the decision of a court upon the relative rights in property of parties litigant which have been voluntarily created by contract . . ." *2 Nichols, Eminent Domain,* § 6.1 at 364 (rev. 3d ed. 1963).

This Court has so held in every case presenting arguments similar to those raised here by PTC. In *Kunhardt & Co. v. United States, supra,* for example, a shipper contracted with the federal government to ship beans from Central America to New Orleans. In order to make the shipment, the shipper was obliged to employ a schooner which it had been negotiating to sell, and for which it had received an offer of $75,000. Subsequently, the government exercised its contractual right to cancel the shipping agreement. The shipper then sold the schooner for $40,000, and sued the government for $35,000 on the grounds that, having been "forced" to forego the earlier offer of $75,000, its property had been taken without just compensation. This Court rejected this proposition after argument by the Petitioner without even hearing answering argument by the Solicitor General of the United States. (See 69 L. Ed. at 429.) Said this Court:

> "It is clear that on the facts alleged the depreciation in the sale value of the schooner cannot be recovered on the theory which the claimant here urges, that this is compensation for a taking of the schooner

'under eminent domain' in the performance of 'obligatory orders or requisitions' for the sale and delivery of the castor beans. The United States did not requisition or take over the schooner, or appropriate its use. The first purchase contract gave the United States the option to require the castor beans to be delivered at any Gulf port in the United States; and the second specifically required them to be delivered at New Orleans. The United States, therefore, was entirely within its contract rights in insisting that the claimant should deliver the beans at New Orleans, as agreed; and if the claimant had no other means of so delivering them than by using its own schooner for that purpose, it was, in preparing so to do, merely conforming to its contract obligation." 266 U. S. at 540.

See also, *New York, N. H. & H. R. R. v. United States, supra,* rejecting the contention that plaintiff's property had been "taken" under the eminent domain power where the rights and duties of the parties were defined by contract. In that case, a railroad argued that it was an unconstitutional taking to require it to continue to deliver mail under contracts at stipulated prices which had allegedly become confiscatory. This "constitutional" argument was rejected by both the Court of Claims and this Court. Particularly relevant here is the following passage from the Court of Claims opinion:

"If the plaintiff had been compelled to carry the mails without a contract . . . and claimed greater compensation therefor than it received and that less was unreasonable and confiscatory, there would be a sound basis for this claim. However, all of the service which it rendered was under contracts voluntarily entered into with the Government. It may have lost money

> by such contracts; it may have lost so much as to bankrupt it and thus make it in effect completely confiscatory; but that would not be the first time that contractors have lost money by their engagements with the Government; and we have never before known any contractor to claim that property lost by him in the performance of a contract with the Government had been taken from him within the meaning of the Fifth Amendment, and hence that he was entitled to just compensation for the same. What constitutes a 'taking' within the meaning of the Fifth Amendment is a question this court is often called upon to determine, and we have never examined a case in any court where property voluntarily given up and paid for under contract has been claimed as taken under the Fifth Amendment." 53 Ct. Cl. at 237.

Again in *Albrecht v. United States,* 329 U. S. 599, 603-04, this Court held that condemnees were estopped to claim interest on the amount paid for their property where their contractual arrangement with the Government did not provide for interest, even though interest would have been required by the Fifth Amendment absent a contract. *Accord, United States v. 3.25 Acres of Land,* 53 F. Supp. 884, 885 (W. D. N. Y. 1943) ("The right to just compensation for property taken and the right to an award for an amount expressly agreed upon are inconsistent rights."); *United States v. Certain Parcels of Land,* 102 F. Supp. 691, 697 (W. D. Pa. 1952) ("The parties may bind themselves to a consideration which may be either greater or less than just compensation in the constitutional sense.").[10]

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10. See also, *Dolan v. United States,* 351 F. 2d 671 (5th Cir. 1965); *United States v. Dillon,* 346 F. 2d 633 (9th Cir. 1965), *cert. denied,* 382 U. S. 978.

The result reached in the foregoing decisions is dictated not only by the clear language of the Fifth Amendment (which refers only to property "taken" by the government) but simple common sense. To hold that a court's recognition of a voluntary contract between a governmental body and a private person at a price freely negotiated is nevertheless subject to the just compensation provisions of the Fifth Amendment would mean that government, state or federal, could never acquire property as a result of a voluntary negotiation. In every transaction, the private person could resist performance when it came time to perform under the contract on the mere assertion that if he had not previously entered into a voluntary contract he could at a later date have received a higher price in condemnation.

PTC seeks to obscure the central fact that this is purely a contract case, governed by state common law principles, by arguing that the City's continuation in 1939 of the right of purchase which it had held under the 1907 Agreement (Pet. App. 305a) "compelled" PTC to waive its constitutional right to just compensation. This contention is clearly without merit since the execution of the contract was approved by the Federal District Court in the reorganization proceeding in 1939. But beyond this, the argument ignores the huge benefits PTC has received from the City for more than twenty-five years in reliance upon the right of purchase. The City's contributions to PTC began from the moment of the company's birth. In 1939, the City gave its assistance to PRT, then in bankruptcy, and helped it to reorganize into PTC at a time when PTC's stock was virtually worthless.[11] It granted the basic fran-

11. Indeed, PTC's stock was selling at only $5 per share as late as 1962, shortly before SEPTA's creation. Not until SEPTA came into existence in 1963 with the obvious purpose of acquiring

chises pursuant to which PTC has operated trolleys and high-speed cars in and under the streets of Philadelphia; and, most significantly, in reliance on its reserved right of purchase dating from 1907,[12] the City spent more than $250,000,000 on improved transit facilities,[13] which today constitute the heart of the system operated by PTC. The annual cost of these facilities in debt service alone to the City is over $6,000,000 more than the rentals therefor charged to PTC (R. 1172, 1176). Without these valuable improvements which the City owns, and which neither PTC nor PRT could ever have constructed, the small portion of the system owned by PTC would be virtually inoperable and worthless. Yet PTC now says that, having accepted and profited from all of the benefits flowing from its contractual relationship with the City, it has a constitutionally protected right to reject what it now sees as the responsibilities of that contractual relationship.

Moreover, PTC's argument overlooks another aspect of the economic realities existing in 1939. PRT was then utterly bankrupt, and the City could clearly have taken over the entire transit system at that point. Had it done so, the company's stockholders would have lost forever any opportunity to recoup their investment through future earnings of PTC. Instead, the City afforded them such an opportunity, but retained, in amended form, the 1907 right of purchase, and conferred other valuable benefits already

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PTC's assets did speculation drive the price of the stock up. (Testimony of PTC President Albert C. Lyons before Philadelphia City Council on March 23, 1965. The Pennsylvania courts held at a prior stage in this litigation that such testimony is properly subject to judicial notice: Opinion of Spaeth, J., August 27, 1965, p. 3, *aff'd. per curiam* 419 Pa. 471, 233 A. 2d 15 (1965).)

12. The City has actually held a right of purchase with respect to transit facilities since 1857 (Pet. App. 54a-58a).

13. See footnote 3, p. 5, *supra*.

described. As such, the retention of the right of purchase was an entirely reasonable consideration in exchange for this aid to the stockholders under the economic conditions then existing. No principle of constitutional law requires such a severe crippling of the municipal contracting power, as would have limited the City in 1939 to the single forced alternative of an immediate take-over of a bankrupt utility, at great prejudice to the stockholders. Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1604 (1960).

Finally, it is perfectly clear that PTC's predecessor understood in 1939 that the bargain was a valuable one for the company. In public testimony before Philadelphia City Council which is set forth *in extenso* in the trial court's opinion (Pet. App. 150a-57a), counsel for PRT begged the City to accept the amended right of purchase. Two separate and distinct rights of the City were made crystal clear. Under the amended contract, the City could either acquire PTC's property by condemnation at an uncertain price or buy it at the contract price which was fixed on the basis of the unreturned remaining investment of the stockholders and bondholders of the company, plus undistributed earnings.[14] As the trial court observed, "had condemnation taken place immediately, the common stockholders would have received very little" because PTC's initial capitalization was $20,000,000 in excess of the value of the assets for which securities were issued (Pet. App. 157a). The pur-

14. The clear distinction made in the contract right of purchase between the City's right to condemn, and the right of the City or its assignee to acquire the property under the contract at a fixed formula price, destroys PTC's basic argument that this is really a condemnation proceeding (Petition for Certiorari, pp. 26-27). It also provides a conclusive answer to PTC's claim that it has a constitutional right to create additional surplus for which SEPTA must pay by writing up alleged unrealized appreciation of its assets. Such a write up would, as the state courts recognized, transform this litigation into a condemnation proceeding, and deprive the public of the contractual benefits for which it paid.

chase price formula, on the other hand, allowed a return to the stockholders greater than the value of their original stock. In view of the total bankruptcy of PTC's predecessor in 1939, it is evident that the bargain so carefully negotiated at that time was an entirely reasonable one for the company and its stockholders. Under these circumstances, retention of a right to purchase hardly *compelled* PTC to surrender anything; rather, it provided the basis for all of the extraordinary benefits conferred by the City upon PTC. These benefits destroy any argument that the contract price provides less than just compensation.

In sum, the simple truth in this case is that the City of Philadelphia has already paid PTC just compensation for its property many times over. It is the City, SEPTA and the citizens of southeastern Pennsylvania who will have been denied just compensation if PTC can now renege on its promise to sell.

B. The State Courts' Interpretation of the Contract Right of Purchase, Based Upon Settled Principles of State Law, Did Not Deprive PTC of Its Property Without Due Process of Law.

It is evident from the Petition that PTC has attempted to transform every facet of the state court's decision with which it disagrees into an issue of constitutional dimensions. Thus, PTC claims that it has been retroactively denied a fair rate of return on its investment simply because, under the contract, SEPTA is not obliged to assume PTC's liabilities, including a vested, but unfunded liability for pensions to retired employees, who will never work a day for SEPTA (Petition for Certiorari, pp. 22-27).[15]

15. PTC has for many years disclosed this vested, unfunded liability in a footnote to its annual balance sheet which is sent to all stockholders (Exhibit P, 28A-28P, R. 2575-91, 364-65). As of December 31, 1965, a footnote to PTC's own balance sheet reflected

This contention does not raise any legitimate constitutional questions meriting review by this Court. In the first place, it ignores the fact that SEPTA will assume a pension obligation of more than $35,000,000 in past service costs to present PTC employees (See fn. 15, pp. 22-23). But more fundamentally, it ignores the provisions of the City-PTC contract itself. The state courts interpreted this contract as providing that PTC would remain obligated for liabilities outstanding at settlement because that is exactly what the contract says. This is graphically demonstrated by comparing the language of the purchase clause before 1939 with the language then negotiated.

Prior to 1939, the reserved right of purchase permitted the City or its assignee to purchase "all the property, leaseholds and franchises of the Company *subject to all indebtedness now existing or hereafter lawfully created hereunder*" (Emphasis added) (Pet. App. 305a). In 1939, the emphasized words were stricken out of this provision, compelling the conclusion that the state courts correctly decided that SEPTA takes PTC's assets free and clear of all liabilities. This holding accords with settled state

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a total pension obligation of more than $42,000,000 to employees who had already retired and to present non-supervisory employees who had accrued past service costs for prior service (Exhibit P, 28-P; R. 2591, 365). This figure does not include any amount for past service costs attributable to present supervisory employees. None of the pension liability was ever taken into account by PTC to reduce the amount of undistributed surplus carried on PTC's books, thus requiring SEPTA to pay a higher purchase price.

PTC has stipulated that approximately $17,000,000 of this pension obligation is a vested liability (R. 964). This is the amount which PTC must assume under the terms of the right of purchase. The balance of this obligation—more than $35,000,000 if supervisory employees are included—will be assumed by SEPTA. Although it was perfectly free to do so, PTC never made any provision for funding any of this mounting pension obligation. It must therefore make provision for its retired employees (who will never work for SEPTA) out of the purchase price payable by SEPTA.

law, for it is hornbook law in Pennsylvania, as elsewhere, that where one party sells all of its assets to another, the purchaser is not, absent a specific provision to the contrary, liable for the debts and liabilities of the seller. *Advance Beneficial Order v. Penn Safe Deposit & Trust Co.*, 195 Pa. 602, 613-14, 46 Atl. 102 (1900); *Art Society v. Leader Publishing Co.*, 60 Pa. Super. 548 (1915); *Fletcher, Cyclopedia Corporations*, § 7122 (rev. ed. 1961); *Ballantine, Corporations*, p. 677 (rev. ed. 1946). As amended in 1939, the 1907 Agreement contains no such provision, and the history of the Agreement proves that this omission was deliberate.

Despite the fact that SEPTA will be saddled with by far the greatest portion of the unfunded pension obligation (an obligation of which PTC could never divest itself if it attempted to liquidate), PTC presses its contention that it has been retroactively deprived of a fair rate of return on its investment by arguing that it did not, in past years, claim as an operating expense for rate making purposes any amount to fund the pension liability. Indeed, PTC goes much further and implies that it was *required* to treat its pensions on a pay-as-you-go basis for rate making purposes (Petition for Certiorari, pp. 22-24). This is flatly wrong. PTC could have commenced funding its pension liability in 1939 or any other year. Funding payments would have been treated as an operating expense for rate purposes by the Pennsylvania Public Utility Commission. This is the holding of the very Pennsylvania case cited by PTC for the contrary proposition, *Pittsburgh v. Pa. P. U. C.*, 370 Pa. 305, 316-23, 88 A. 2d 59, 65-69 (1952).[16] Moreover, it was shown at the trial in the instant case that many other utilities in Pennsylvania subject to P. U. C. jurisdiction have funded pension plans (R. 1417-18, 1731-32). Thus

16. Petition for Certiorari, p. 23, fn.

it is evident that PTC is now complaining only of the inevitable consequences of its own bad judgment in failing to make any provision whatsoever for its vested pension liability, in the face of its voluntary contractual obligation to pay off that liability on exercise of the City's right of purchase.[17]

C. The State Courts' Ruling That the Phrase "Then Undistributed Corporate Surplus" in the Contract Meant "Retained Earnings" Does Not Violate Any Constitutional Provision.

PTC urges (Petition for Certiorari, pp. 27-31) that the Fourteenth Amendment was somehow violated because the state courts' ruling that "then undistributed corporate surplus" meant "retained earnings" allegedly lacked "fair support" in state law.[18] How this ruling rises to the level of a constitutional deprivation is not articulated. In any

17. A study used in a publication by the firm of one of PTC's accounting experts disclosed that only 17 out of 291 reporting companies had failed to make any provision for funding pension obligations (R. 1807-08).

18. PTC also suggests—without briefing the point—that this ruling, and the rulings extending the time of payment and holding that PTC had no right to bid on the assignment of the right of purchase violated Article I, § 10 of the Constitution by impairing PTC's contract. (Petition for Certiorari, pp. 7-8, Question 6.) This unfounded contention must fail because the Contract Clause's prohibition is applicable only against legislative action, while in this case all the challenged "impairments" resulted from the application of settled principles of state law by the state courts. *E.g., Tidal Oil Co. v. Flanagan*, 263 U. S. 444.

On the question of extension of time for performance under an option where one party has made performance impossible, see, *e.g., Unatin 7-Up Co. v. Solomon*, 350 Pa. 632, 39 A. 2d 835 (1944); *Sidle v. Kaufman*, 345 Pa. 549, 554, 29 A. 2d 77, 80 (1942); *Shattuck v. Cunningham*, 166 Pa. 368, 381, 31 Atl. 136, 141 (1895). On the question of a "right" to bid on the assignment of the right of purchase, for which the contract provided that PTC "may become a bidder," see, *e.g., Commonwealth v. A. M. Byers Co.*, 346 Pa. 555, 561, 31 A. 2d 530, 532, *cert. denied*, 320 U. S. 757 (1943); *Connell v. Kennett Twp. Bd.*, 356 Pa. 585, 589, 52 A. 2d 645, 647, *appeal dismissed*, 332 U. S. 748 (1947).

event, it is incorrect. PTC seeks to gain nourishment from several abstract definitions of the term "surplus" which were formulated in contexts wholly irrelevant to this case. The definitions could have no conceivable relevance here unless there were no evidence of what the parties meant by their use of the phrase "then undistributed corporate surplus." As the trial court demonstrated in its opinion (Pet. App., pp. 150-57a), the parties' intent was unmistakably clear: to return to PTC's stockholders such amounts as could have been distributed as a cash dividend, i.e., retained earnings. Under these circumstances, no other conclusion than that reached by the state courts with respect to the meaning of "then undistributed surplus" finds *any* support in state contract law, where it is a hornbook proposition that the intent of the parties is controlling.

D. No Question Appropriate for Review on Writ of Certiorari Is Presented by the State Court's Grant of a Preliminary Injunction, Now Expired, Prohibiting PTC From Commencing Suit in the Federal Courts Pending Disposition of the State Court Appeal Previously Taken by PTC.

In a final attempt to invoke this Court's jurisdiction, PTC contends that it was deprived of due process by a preliminary injunction, now expired, which prohibited it from circumventing the appellate jurisdiction of the Pennsylvania Supreme Court by filing a federal suit before PTC's state appeal had been decided.[19] It is clear that no question appropriate for review by this Court on writ of certiorari is raised by the grant of this temporary relief.

In the first place, the propriety of the preliminary injunction is now a moot question, since it has already ex-

19. The Resolution to file the federal court action was by an improperly constituted PTC Board of Directors and thus was without force or effect (See p. 13, fn. 9, *supra*).

pired and PTC, in fact, has stated that it *never* applied to the type of suit it wished to file and is now pursuing, without threat or fear of contempt, in the Federal District Court (PTC Complaint filed in C. A. 44348). It is well settled that an appeal becomes moot where it "cannot affect the rights of the litigants in the case before it." *St. Pierre v. United States*, 319 U. S. 41, 42. Here, PTC is presently pressing its repetitious claims in the federal courts, and it would be meaningless to declare now that the preliminary injunction previously restraining such conduct was improper.

PTC attempts to avoid the problem of mootness by arguing that said injunction wrongfully barred it from "timely" access to the federal courts, and improperly vested the state court judgment with *res judicata* effect. What PTC overlooks, however, is that under Pennsylvania law, *res judicata* became applicable, even though an appeal was pending, when the final judgment of the state trial court was rendered on September 16, 1966—four months *before* the preliminary injunction was issued. The Pennsylvania rule is clear and definitive. *Wallace's Estate*, 316 Pa. 148, 153, 174 Atl. 397, 399 (1934), wherein the court said:

> "[W]hen a court of competent jurisdiction has determined a litigated cause on its merits, the judgment entered, *until reversed*, is, forever and under all circumstances, final and conclusive as between the parties to the suit and their privies. . . ." (Emphasis added.)

In *Makariw v. Rinard*, 222 F. Supp. 336, 338 (E. D. Pa. 1963), *rev'd on other grounds*, 336 F. 2d 333 (3rd Cir. 1964), the federal Court in Pennsylvania, applying Pennsylvania law, held:

> "The fact that an appeal is pending in the prior civil action does not mitigate against its effect as a final judgment. Pennsylvania recognizes a judgment as final until reversed."

Accord, Helmig v. Rockwell Mfg. Co., 389 Pa. 21, 29, 131 A. 2d 622, 626 (1957), *cert. denied*, 355 U. S. 832; *Merchant's Ins. Co. v. DeWolf*, 33 Pa. 45 (1859); *Marsh v. Pier*, 4 Rawle 273, 288 (Pa. 1833). The federal law is the same, see 1B MOORE, FEDERAL PRACTICE, ¶ 0.416[3] at pp. 2252-54 (2d ed. 1965). Thus, if PTC had filed the suit in federal court at the time originally intended, the federal court would have been required to give conclusive effect to the final decree of September 16, 1966, even though an appeal was pending in the Supreme Court of Pennsylvania. *Makariw v. Rinard, supra*, at 338 fn. 1; see 28 USC § 1738. Since the final unreversed judgment of the Court of Common Pleas was *res judicata* before the issuance of the preliminary injunction challenged here, the question of the propriety of the injunction is now moot.

Moreover, the preliminary injunction complained of specifically granted PTC the opportunity at any time to have a hearing on whether such injunction should be made permanent (Pet. App. 231a). PTC never accepted this opportunity offered by the state court.

Finally, it is clear that the preliminary injunction was properly issued by the state court. In support of its contrary argument, PTC cites only the case of *Donovan v. City of Dallas*, 377 U. S. 408, which the Pennsylvania courts fully considered, and correctly found inapplicable, in following the decisions of this Court governing the case at bar.

The *Donovan* case dealt with the power of a state court to enjoin permanently parties to a completed state suit from prosecuting a similar federal action where the federal suit

had been filed, answered and dismissed in the federal district court prior to issuance of the injunction. Donovan had been held in contempt by the state courts merely for appealing to the United States Court of Appeals for the Fifth Circuit from a dismissal of the federal suit by the district court. The Texas State Court ordered Donovan to withdraw his appeal under pain of a contempt citation. In these circumstances, the jurisdiction of the federal court had attached and could not be defeated by the subsequent action of the state court, whose power over the subject matter had been exhausted by its final decision on the merits of the litigation. That this was vital to the decision of this Court is shown by the majority opinion which stated that "the heart of the rule . . . is that:

> 'where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. . . .'" 377 U. S. at 413, quoting *Peck v. Jenness*, 7 How. 612, 625.

Conversely, where a federal suit has not yet been started, and the state litigation is still being pursued on an appeal invoked by the very party who then files the federal suit, the state courts may prevent the subversion of their jurisdiction by temporarily enjoining the litigant before he files the federal suit while the state court is still considering the matter. As held by this Court in *Harkrader v. Wadley*, 172 U. S. 148, 164:

> "When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases."

Accord, Peck v. Jenness, supra. The injunction issued here by the state court merely recognized this settled principle, and was therefore proper.[20]

It is, therefore, clear that the issuance of the preliminary injunction does not pose any question warranting review by this Court.

IV.

CONCLUSION.

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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20. Thus, this Court has long recognized that a court whose jurisdiction has first been invoked has the right to prevent vexatious and duplicative litigation in another court until the first court has exhausted its jurisdiction. *E.g., Baltimore & Ohio R. Co. v. Kepner,* 314 U. S. 44, 51-52; *Cole v. Cunningham,* 133 U. S. 107. *Accord, Trees v. Glenn,* 319 Pa. 487, 181 Atl. 579 (1935).